SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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IN CIRCUIT COURT OF SEBASTIAN COUNTY, FORT SMITH DISTRICT

OSSIE MCCRAY, Plaintiff,

vs.

LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

COMPLAINT AT LAW—Filed July 14, 1932

Comes the plaintiff herein, Ossie McCray, and complains of the Life and Casualty Insurance Company of Tennessee, and for cause of action, alleges:

That said defendant is a corporation of the State of Tennessee, engaged in the business of life insurance, and has qualified to do a life insurance business in the State of Arkansas, and has complied with the laws of the State of Arkansas, as a condition of doing life insurance business in said State.

That Jonas McCray was a resident of Fort Smith, Arkansas, and did obtain a policy of life insurance in said Company on the 3rd day of November, 1930, wherein the company agreed in consideration of the payments therein made and the semi-annual premium of $8.52, payable on the first days of November and May in each year, to pay upon the receipt of due proof of death of said Jonas McCray and the surrender of said policy the sum of $500 to Ossie McCray, wife of the insured, the beneficiary therein named, if living.

The original of said policy is in the possession of this plaintiff, and a copy thereof in the records of the defendant, and the original is held subject to the inspection of the defendant and the Court.

[fol. 3] That Jonas McCray died May 10, 1932. That he had paid the last semi-annual payment due on May 1st, 1932, in the sum of $8.52, and an official receipt therefor was issued by the defendant company, and is in the possession of the plaintiff.

That immediately after the death of the said Jonas McCray, the plaintiff made due proof of said death and delivered said policy to the defendant's agent for the purpose of surrender on the payment of said sum of $500.

That thereafter, the defendant denied liability for the payment of said $500. That the plaintiff has made demand upon the defendant for payment of said sum, and the defendant has wholly failed to do so.

That the defendant is doing business in the Fort Smith District of Sebastian County, Arkansas, and D. E. Bryan is the duly licensed agent, and is District Manager of the defendant, having an office in the City of Fort Smith, Arkansas.

Wherefore, the plaintiff prays judgment against the defendant for the sum of $500, with interest from the date of the receipt of proof of death by the defendant, and for a reasonable attorneys' fees and 12% penalty, and all other and further relief which the plaintiff is entitled to receive.

Hill, Fitzhugh & Brizzolara, Attorneys for Plaintiff.

[File endorsement omitted.]

(Summons issued on the 14th day of July, 1932, and returned duly served on the 14th day of July, 1932.)

[fol. 4] In Circuit Court of Sebastian County

[Title omitted]

Answer—Filed Aug. 25, 1932

Comes now the above named defendant, and for its answer to the complaint of the plaintiff, alleges and states:

That it is provided by the terms, provisions and conditions of the policy sued on herein, as follows:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the Company shall be limited to the amount of the premiums paid hereon."

It is further provided by the policy sued on herein that:

"This policy may be reinstated at any time after default in the payment of any premiums, unless the cash value has been paid or the extension period has expired, upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company hereon, and the payment of overdue premiums, with interest at six per cent per annum."

That the policy sued on herein was issued and took effect on the 3rd day of November, 1930, but that said policy lapsed thirty days after the first day of May, 1931, by reason of the failure of said Jonas McCray, now deceased, or anyone for him, to pay the premium due on said policy, in [fol. 5] the sum of $8.52, on the first day of May, 1931, it being provided by the terms of said policy as follows:

"A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If any premium or installment of premium be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided."

That said policy of insurance was reinstated under the reinstatement provision of said policy, as hereinabove set out, on the first day of August, 1931.

That on or about the 10th day of May, 1932, the insured, Jonas McCray, committed suicide, and died by his own hand, as a result of phenol poisoning, caused by the said insured wilfully, intentionally and knowingly taking said poison for the purpose of taking his own life, and which resulted in the death of the said Jonas McCray, as aforesaid.

That upon the lapse of said policy, as hereinabove alleged, the policy sued upon became void. That the reinstatement of said policy of insurance effected a new contract between the defendant — the said Jonas McCray, said new contract being on the same terms, provisions and conditions as the lapsed contract of insurance. That the suicide clause above set forth upon such renewal commenced

to run again, and the said Jonas McCray took his own life, as aforesaid, within one year from the date of said new contract, and that by reason of said fact, and said suicide clause, the liability of this defendant is limited to the [fol. 6] amount of the premiums paid by the said Jonas McCray, under said policy of insurance and renewal thereof.

The defendant offers herewith to confess judgment for the amount of said premiums paid by the said Jonas McCray, in the sum of $34.08, and tenders herewith and deposits with the Clerk of this Court the sum of $34.08, which said sum is the total amount of premiums paid by the said Jonas McCray on the policy of insurance herein sued upon and the renewal thereof. That heretofore, on the 18th day of June, 1932, the defendant tendered to the plaintiff said sum of $34.08, which said tender was made prior to the filing of the suit herein, but that said tender was refused and declined by the plaintiff.

That an exact copy of the policy of insurance sued on herein is hereto attached, marked Exhibit "A", and made a part of this complaint, as though set forth at length in this complaint.

Wherefore, premises considered, defendant prays that the plaintiff take nothing by reason of her suit herein, beyond the amount of said premiums tendered and paid herewith, and that the defendant recover its costs herein laid out and expended, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

(Here follows Exhibit "A" to Answer, side folios 6a, 6b, 6c and 6d)

EXHIBIT "A" TO ANSWER

INTERMEDIATE WHOLE LIFE POLICY

INCORPORATED UNDER THE LAWS OF THE STATE OF TENNESSEE

LIFE AND CASUALTY

Insurance Company

OF TENNESSEE

NUMBER | AMOUNT | PREMIUM | AGE

HOME OFFICE
LIFE AND CASUALTY BUILDING

NASHVILLE, TENNESSEE

In Consideration of the application for this Policy, copy of which is attached hereto and made a part hereof, and the payment of the Semi-Annual premium of $8.52 Dollars Semi-Annually on the First day of November and May in each year during the continuance of this Policy, hereby promises to pay at its Home Office in the City of Nashville, Tennessee, Five Hundred DOLLARS, less any indebtedness due the Company and any unpaid portion of the premium for the then current policy year ... surrender of this Policy properly receipted immediately upon receipt of due proof of the death of

SPECIMEN

less any indebtedness due the Company and any unpaid portion of the premium for the then current policy year upon surrender of this Policy properly receipted immediately upon receipt of due proof of the death of

Jonas McCray
The Insured

of Fort Smith in the County of Sebastian State of Arkansas,

unto Ossie McCray Wife of the insured
The Beneficiary

if living, otherwise to the executors, administrators or assigns of the Insured.

GENERAL PROVISIONS

Only the President, Vice-President, Secretary, Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract.

This Policy and the application therefor shall constitute the entire contract, and all statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defense of a claim under this Policy unless contained in the written application herefor, copy of which is endorsed hereon or attached hereto.

The first year's insurance under this Policy is term insurance purchased by the whole or part of the premium received during the first policy year. The reserve to be held for the protection of this Policy shall be the reserve according to the New York Standard Intermediate Table of Mortality, with three and one-half per cent. interest. (Illinois Standard.)

This Policy is subject to the conditions and provisions stated on this and the following pages hereof, which form a part of this contract as fully as if recited at length over the signatures hereto affixed, and in the event that such conditions or provisions are not in all respects observed, this Policy shall become void and all rights thereunder forfeited.

In Witness Whereof, The Life and Casualty Insurance Company of Tennessee has caused this Policy to be signed by its President and Secretary, at its Home Office in the City of Nashville, Tennessee, this 3rd. day of November nineteen hundred and thirty.

SPECIMEN COPY

Edward E. Loskamp
President

SPECIMEN COPY

Secretary

Examined and countersigned

INTERMEDIATE WHOLE LIFE POLICY. Form 92
5-20-31—3000

Brandon-Nashville

Exhibit "A"

CONDITIONS

PREMIUMS. This Policy shall not take effect until the first premium shall have been paid in cash and this contract delivered and accepted during the lifetime and good health of the Insured. If the premium is paid in cash when application is taken, the risk shall be assumed as of date of the application subject to all the terms and conditions of the Policy.

All premiums are payable in advance at said Home Office or to an agent of the Company upon delivery, on or before the date due, of a receipt signed by the President, Secretary, or Treasurer of the Company and countersigned by said agent. Except as herein provided the payment of a premium or instalment thereof shall not maintain this Policy in force beyond the date when the next premium or instalment of premium is payable.

GRACE. A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If any premium or instalment of premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

INCONTESTABILITY. This Policy shall be incontestable after it shall have been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premiums and except for violation of the conditions of the Policy relating to military and naval services in time of War. But where the Statute of the State in which this Policy is written contains a different provision on this subject than the above, the language of such Statute shall be substituted for this clause.

AGE. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid hereon would have purchased at the correct age.

SUICIDE. If within from the date of issue of this Policy the Insured shall, whether sane or insane, die by his own hand, the liability of the Company shall be limited to the amount of the premiums paid hereon.

ASSIGNMENT. No assignment of this Policy shall be binding upon the Company unless it be executed upon the blanks furnished by the Company and filed with the Company at its Home Office in the City of Nashville, Tennessee. The Company assumes no responsibility as to the validity of any assignment.

CHANGE OF BENEFICIARY. The Insured may, without the consent of the beneficiary, receive any benefit, exercise every right and enjoy every privilege conferred by this Policy. Provided this Policy be not assigned, the Insured may at any time and from time to time change the beneficiary hereunder, by written request upon the Company's forms, such change to take effect upon the written endorsement of the same upon the Policy by the Company.

NON-FORFEITURE PROVISIONS. After three full annual premiums shall have been paid, if default be made of any payment of any subsequent premium, this Policy shall automatically at time of lapse be unconditionally commuted to non-forfeitable paid-up insurance as provided below, payable at the same time, and on the same terms, save as to amount, as this Policy.

Within ninety days after said commutation, the Insured, in lieu of this automatic unconditional non-forfeitable paid-up insurance, may upon written demand addressed to the Home Office of the Company receive either of the following options:

1. Receive the cash surrender value of this Policy, less any indebtedness to the Company hereon. The

Within ninety days after said commutation, the Insured, in lieu of this automatic unconditional non-forfeitable paid-up insurance, may upon written demand addressed to the Home Office of the Company receive either of the following options:

1. Receive the cash surrender value of this Policy, less any indebtedness to the Company hereon. The cash surrender value shall be the reserve on this Policy at the date of default, less a surrender charge, which in no case shall be more than two and one-half per cent. of the sum insured; or

2. Receive extended insurance from date of default for an amount equal to the face of this Policy, for such term in years and months from the date of default as is provided below, but without the right to loans and cash surrender values.

The amount of the paid-up insurance or the term for which the Insurance will be extended shall be such as the cash surrender value will purchase as a net single premium at the attained age of the Insured at the date of default according to the New York Standard Intermediate Table of Mortality, with interest at the rate of three and one-half per cent. per annum.

Any indebtedness to the Company under this Policy will be deducted from the cash surrender value; and such indebtedness will also reduce the amount of paid-up insurance, or the amount which is continued as extended insurance, in such ratio as the indebtedness bears to the cash surrender value at due date of premium in default.

CASH LOANS. At any time after three full years' premiums shall have been paid in cash, and while this Policy is in full force, the Company will loan on the sole security of this Policy, upon legal assignment of the same as collateral security, the cash value hereunder, any indebtedness to the Company and interest on the amount loaned to the end of the current policy year being first deducted. Interest at the rate of six per cent. on such loans shall be payable annually in advance, and if not paid when due, shall be added to the amount of the loan and bear an interest charge.

It is especially provided that the Company shall have the right to defer any loan under this Policy, or to defer the granting of any cash surrender value under this Policy for a period not exceeding sixty days after application for such loan or cash surrender value shall have been made.

Failure to repay a Policy loan or premium loan, or to pay interest thereon, shall not avoid the Policy unless the total indebtedness thereon, including accrued interest, shall equal or exceed the loan value at the time of such failure, nor until one month after notice has been mailed by the Company to the last known address of the Insured and Assignee of record at the Home Office of the Company, if any.

MILITARY AND NAVAL SERVICE. The liability of the Company shall be limited to the reserve on this Policy, or to one-fifth of the amount payable hereunder on the death of the Insured, whichever amount is the greater, if the Insured shall engage in military or naval service in time of war without securing a permit to be signed by an executive officer of the Company, and paying such extra premium as the Company may fix to cover the hazard. The extra premiums charged for such permits in excess of the amount necessary to cover the extra hazard shall be returned to the policyholders contributing same.

AVIATION. If within two years from the date of issue of this Policy the Insured shall die in consequence of having been engaged in an aerial flight, or any form of aviation, the liability of the Company shall be limited to the amount of the premiums paid hereon. But where the Statute of the State in which this Policy is written contains a different provision on this subject than the above, the language of such Statute shall be substituted for this clause.

PREMIUM LOANS. Upon request of the Insured, and Assigns, if any, made prior to default in premium payment and remaining unrevoked the premiums thereafter falling due and not paid will be charged as a loan against this Policy with interest as in the case of Cash Loans, provided the then Cash Surrender Value be sufficient to cover such loan. Any premium loan may be repaid at any time.

REINSTATEMENT. This Policy may be reinstated at any time after default in the payment of any premium, unless the Cash Value has been paid or the extension period has expired; upon production of evidence of insurability satisfactory to the Company, the payment or reinstatement of any indebtedness to the Company hereon, and the payment of overdue premiums with interest at six per cent. per annum.

SURRENDER OPTIONS FOR $1000 INSURANCE

The Options below stated, except the term of the Extended Insurance, which is not affected by the amount of the Policy, apply to a Policy of $1,000—this Policy being for $.....the various Options at the end of any year will be respectively..... times the amounts stated for that year.

	COLUMN 1	COLUMN 2	COLUMN 3	
FOR END OF YEAR	CASH OR LOAN VALUE	PAID-UP POLICY	EXTENDED INSURANCE	
			YEARS	MONTHS
1	None	None	None	1
2	None	None	None	2

The Options below stated, except the term of the Extended Insurance, which is not affected by the amount of the Policy, apply to a Policy of $1,000—this Policy being for $.....the various Options at the end of any year will be respectively..... times the amounts stated for that year.

FOR END OF YEAR	COLUMN 1 CASH OR LOAN VALUE	COLUMN 2 PAID-UP POLICY	COLUMN 3 EXTENDED INSURANCE	
			YEARS	MONTHS
1	None	None	None	1
2	None	None	None	2
3	$	$		
4	$	$		
5	$	$		
6	$	$		
7	$	$		
8	$	$		
9	$	$		
10	$	$		
11	$	$		
12	$	$		
13	$	$		
14	$	$		
15	$	$		
16	$	$		
17	$	$		
18	$	$		
19	$	$		
20	$	$		

The figures contained in the above table represent the maximum amounts available, assuming that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness to the Company hereon.

WHEN WRITING ABOUT THIS POLICY
DO NOT FAIL TO GIVE ITS NUMBER

No. _____

LIFE AND CASUALTY

Insurance Company

OF TENNESSEE

HOME OFFICE
LIFE AND CASUALTY BUILDING

NASHVILLE, TENNESSEE

NAME OF INSURED

_____

AMOUNT $ _____

DATE _____

KIND _____

_____ PREMIUM $ _____

PREMIUM DUE _____ DAY OF _____

_____ IN EACH YEAR

INTERMEDIATE WHOLE LIFE POLICY

SPECIMEN COPY

REGISTER OF CHANGE OF BENEFICIARY

NOTE.—No change, designation or declaration shall take effect until endorsed on this Policy by the Company at the Home Office.

DATE ENDORSED	BENEFICIARY	ENDORSED BY

REGISTER OF POLICY LOAN

AMOUNT OF LOAN	DATE OF LOAN	ENDORSED BY

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[fol. 7] IN CIRCUIT COURT OF SEBASTIAN COUNTY, OCTOBER TERM, 1932

No. 7085.

OSSIE McCRAY, Plaintiff,

v.

LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

JUDGMENT—October 5, 1932

This cause coming on to be heard, the plaintiff appearing by her attorneys, Hill, Fitzhugh & Brizzolara, and the defendant appearing by its attorneys, Cravens & Cravens, and counsel announcing ready for trial, and that a jury was waived, and that the case be submitted upon the pleadings, and agreed statement of facts this day filed.

Thereupon the Court proceeded to hear and determine said cause, and doth find that the policy sued upon was in force at the time of the death of Jonas McCray on May 10th, 1932, and that due proof of loss was made and received by the defendant on the 20th day of May, 1932, and that defendant denied liability upon said policy, except for the amount of premiums paid, which was tendered and declined.

The Court finds that the plaintiff is entitled to recover the face of the policy, $500, with interest from the 20th day of May, 1932, amounting to $11.25, and that she is entitled to recover 12% penalty, amounting to $60.00, and Attorneys' fee, and after hearing evidence on said subject, the Court finds that $100 for services in the Circuit Court and $100 for services in the Supreme Court are reasonable attor-
[fol. 8] neys' fees to be taxed as costs, and the defendant expressing an intention to appeal the case, the Court finds that the attorneys' *fees to be taxed as costs, and the defendant expressing an intention to appeal the case, the Court finds that the attorneys'* fee of $200 should be taxed as costs.

It is by the Court considered, ordered and adjudged that the plaintiff, Ossie McCray, have and recover of and from the defendant, Life and Casualty Insurance Company of

Tennessee, the sum of $771.25, and that she may have execution therefor, provided, however, in the event the defendant pays the judgment without appealing to the Supreme Court, it will stand reduced by the sum of $100.

[fol. 9] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Oct. 5, 1932

Comes now the above named defendant, and moves the Court to set aside the judgment of the Court rendered herein on the 5th day of October, 1932, and for grounds therefor states:

1. Because said judgment is contrary to law.

2. Because said judgment is contrary to the agreed statement of facts filed herein.

3. Because the Court erred in rendering judgment in favor of the plaintiff.

4. Because the Court erred in holding that the one year suicide period ran from the date of the original policy sued on herein.

5. Because the Court erred in holding that the suicide clause herein did not commence to run anew from the date of the reinstatement of the policy sued on herein.

6. Because the Court erred in holding that the plaintiff was entitled to recover for the death of Jonas McCray resulting from suicide, where said suicide occurred after the reinstatement of the policy sued on, and before the expiration of one year from said date.

Wherefore, premises considered, plaintiff prays that the judgment of the Court rendered herein, as aforesaid, be set aside and held for naught, and that it be granted a new [fol. 10] trial herein, and for all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—October 5, 1932

On this day comes the defendant and files motion for a new trial herein, and said motion now coming on to be heard, the parties appear by their respective attorneys. The Court, after hearing argument of counsel, being well and sufficiently advised in the premises, doth overrule said motion, to which action of the Court in overruling said motion for a new trial, the defendant at the time saved its exceptions and is by the Court allowed 60 days in which to prepare and file its Bill of Exceptions; and the defendant prays and is granted an appeal to the Supreme Court of the State of Arkansas.

[fol. 12] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

SUPPLEMENTAL MOTION FOR NEW TRIAL—Filed Oct. 18, 1932

Comes now the above named defendant, and moves the Court to set aside the judgment of the Court with reference to penalty and attorney's fee rendered herein on the 5th day of October, 1932, and for grounds therefor, states:

1. That the Court erred in allowing a penalty in favor of the plaintiff and against the defendant.

2. Because the Court erred in allowing, in favor of the plaintiff and against the defendant, a fee for plaintiff's attorneys herein.

3. Because the Court erred in allowing a penalty in favor of the plaintiff and against the defendant, for the reason that the defendant, in resisting plaintiff's claim, had reasonable grounds and cause therefor, and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the plaintiff was not en-

titled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness or unreasonableness of the defendant's [fol. 13] refusal to pay, and without regard to whether or not the refusal to pay was vexatious, and without regard to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the plaintiff was not entitled to recover, and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law, and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8 of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for, and without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard to whether the defendant's refusal to pay was based upon a well founded belief, reasonably entertained, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinabove set forth.

4. Because the Court erred in allowing an attorney's fee in favor of the plaintiff and against the defendant, for the reason that the defendant, in resisting plaintiff's claim, [fol. 14] had reasonable grounds and cause therefor, and that the defendant, in refusing to pay said claim, did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the plaintiff was not entitled to recover in this cause, and that said attorney's fee was taxed against the defendant solely by

reason of the fact that the plaintiff recovered the amount sued for; and that said attorney's fee was allowed as aforesaid without regard to the reasonableness or unreasonableness of the defendant's refusal to pay, and without regard to whether or not the refusal to pay was vexatious, and without regard to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the plaintiff was not entitled to recover, and that the Court in allowing said attorney's fee under the circumstances aforesaid, deprived the defendant of the equal protection of the law, and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8 of the Constitution of the State of Arkansas, said allowance of attorneys' fee having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, *and which said Section, as construed by the Supreme Court of Arkansas,* authorizes the allowance of an attorney's fee in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount used for, and without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, [fol. 15] and without regard to whether the defendant's refusal to pay was based upon a well founded belief, reasonably entertained, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinbefore set forth.

Wherefore, premises considered, defendant prays that the judgment for penalty and attorney's fee rendered herein be annulled, set aside and held for naught, and that the defendant be granted a new trial with reference to the same, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

ORDER OVERRULING SUPPLEMENTAL MOTION FOR NEW TRIAL —October 18, 1932

Comes the defendant and files supplemental motion for a new trial herein, and said motion now coming on to be heard, the parties appear by their respective attorneys. The Court, after hearing argument of counsel, being well and sufficiently advised in the premises, doth overrule said motion, to which action of the Court in overruling said motion for new trial, the defendant at the time excepted, and prays an appeal to the Supreme Court, which is granted; and the defendant is allowed the time heretofore indicated on its original motion in which to prepare and file its Bill of Exceptions herein.

[fol. 17] IN CIRCUIT COURT OF SEBASTIAN COUNTY, FORT SMITH DISTRICT

No. 7085

OSSIE McCRAY, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

Bill of Exceptions

Be it remembered that on the 5th day of October, 1932, the same being a day of the regular October 1932 term of this court, the above entitled cause having been reached on its regular call, the plaintiff appeared by her attorneys, Hill, Fitzhugh & Brizzolara, and the defendant by its attorneys, Cravens & Cravens, and announced ready for trial. Thereupon a jury was waived by the respective parties, through their attorneys as aforesaid, and this cause was submitted to the court sitting as a jury upon the following agreed statement of facts, which said agreed

statement of facts was agreed to an- signed by the parties hereto on the 21st day of September, 1932, and filed in this cause on this day, and which said agreed statement of facts is in words and figures as follows, to-wit:

AGREED STATEMENT OF FACTS

It is agreed by and between Hill, Fitzhugh & Brizzolara, attorneys for the plaintiff in the above entitled cause, and Cravens & Cravens, attorneys for the defendant in said cause, that the same will be submitted to the court upon the following agreed statement of facts, which are stipulated to be the facts in the cause necessary to a proper determination thereof.

[fol. 18] I

That on the 3rd day of November, 1930, the defendant executed its policy of life insurance to Jonas McCray in the sum of $500, payable in case of the death of the said Jonas McCray to the above named plaintiff as the beneficiary named in said policy. That said policy is dated November 3, 1930, and was issued subject to the terms, provisions and conditions in said policy set forth, which, so far as material to this cause, are hereinafter set out. That said policy was issued in consideration of a semi-annual premium of $8.52, payable on the first day of November and May in each year. The policy was delivered in Fort Smith, Arkansas, to Jonas McCray after the date of said policy and while the said Jonas McCray was in good health, and that the first premium on said policy was paid at the date of its delivery. That said policy of insurance is an Arkansas contract.

II

That said Jonas McCray paid all the premiums on said policy except the premium due on the first day of May, 1931, and that the premium due on the first day of May, 1931, was not paid on the date thereof, or during the period of grace provided for in said policy.

III

That it is provided in said policy as follows:

"A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium

after the first, during which time the insurance shall continue in force. If any premium or installment of premium be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided."

[fol. 19] That it is further provided by the policy issued as aforesaid and sued on herein, as follows:

"This policy may be reinstated at any time after default in the payment of any premium, unless the cash value has been paid or the extension period has expired, upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company herein, and the payment of overdue premiums, with interest at six per cent per annum."

IV

That said policy issued as aforesaid and sued on herein, and after the default in the payment of the premium due on the first day of May, 1931, was by the said Jonas McCray reinstated under the provisions of the policy aforesaid, said reinstatement having taken place on the 15th day of July, 1931, and that the premiums thereafter accuring on November 1, 1931, and May 1, 1932, were fully paid by the said Jonas McCray.

V

That the policy issued as aforesaid and sued on herein provides as follows:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

VI

That the said Jonas McCray committed suicide and died by his own hand on the 10th day of May, 1932, less than one year after the reinstatement of said policy as aforesaid.

VII

[fol. 20] That prior to the institution of this suit, the defendant offered to pay the plaintiff the sum of $34.00, which sum is the total amount of premiums paid on the policy aforesaid, and that said offer of payment was refused by the plaintiff.

In witness whereof the respective attorneys aforesaid have hereunto set their hands this 21st day of September, 1932.

(Signed) Hill, Fitzhugh & Brizzolara, Attorneys for Plaintiff. (Signed) Cravens & Cravens, Attorneys for Defendant.

Thereupon the plaintiff offered proof on the question of a reasonable attorneys' fee to be allowed plaintiff's attorneys herein in the event judgment was rendered for the plaintiff, and the evidence introduced tended to show that a reasonable allowance for plaintiff's attorneys herein is the sum of $100, and that a reasonable fee for plaintiff's attorneys, in the event this suit is appealed to the Supreme Court of Arkansas, is an additional fee of $100.

The above agreed statement of facts and the evidence with reference to attorneys' fee, as aforesaid, and that demand was made prior to suit, was all the evidence heard in this cause.

Thereupon the plaintiff moved the court to render judgment in favor of the plaintiff for the sum of $500, with interest at the rate of 6% per annum from the 20th day of May, 1932, and for a statutory penalty in the sum of $60.00, and for an attorneys' fee in the sum of $100 for services rendered in this court, and for an additional allowance of fee in the sum of $100 for services to be rendered in the [fol. 21] Supreme Court of Arkansas, if this cause should be appealed to said Court. And thereupon the defendant moved the court to render judgment in favor of the defendant, adjudging that the plaintiff take nothing by reason of her suit herein, and that the defendant recover its costs herein laid out and expended.

The court, being well and sufficiently advised, and after hearing the argument of counsel, found for the plaintiff

in the sum of $500 on the policy sued on herein, said sum to bear interest from the 20th day of May, 1932, until paid, and for an additional amount in the sum of $60.00, being 12% of the policy sued on herein, and for an additional amount for plaintiff's attorneys for their services rendered in this cause in this court, and for an additional sum of $100 for plaintiff's attorneys for services in the Supreme Court of Arkansas, if this cause be appealed to said court, and the court thereupon rendered judgment accordingly, to which action of the court the defendant at the time excepted.

Thereafter, on the same day and in apt time, the defendant filed the following motion for new trial, which said motion for new trial is in words and figures as follows, to-wit:

Motion for new trial omitted; printed side page 9 ante.

[fol. 22] And said motion for new trial having been presented to the court, the same was overruled, to the overruling of which the defendant saved its exceptions and prayed an appeal to the Supreme Court of Arkansas, which said appeal was granted, and the defendant allowed sixty days within which to prepare, present and file its bill of exceptions herein. Thereafter, on the 18th day of October, 1932, by agreement of counsel, the defendant filed the following supplemental motion for new trial, which said supplemental motion for new trial is in words and figures as follows, to-wit:

[fols. 23-25] Supplemental motion for new trial omitted; printed side page 12 ante.

[fol. 26] And said supplemental motion for new trial being presented to the court on the 18th day of October, 1932, the same was on the same day overruled, and to the overruling of which motion the defendant at the time saved its exceptions and prayed an appeal to the Supreme Court of Arkansas, which was granted, and the defendant allowed time to file bill of exceptions herein within the period heretofore granted upon the overruling of the original motion for new trial.

AGREEMENT AS TO BILL OF EXCEPTIONS

It is agreed by and between counsel of record for the plaintiff and defendant in this cause that the foregoing bill of exceptions contains all of the evidence and agreed facts heard or offered in the trial of said cause, and all exceptions thereto; the motions for new trial and the exceptions thereto, and all proceedings had and done in the trial of this cause, and that the same is in all things correct. It is further agreed between counsel for the parties to said cause that said bill of exceptions, when filed by the Clerk of the Sebastian Circuit Court for the Fort Smith District, shall become a part of the record in this cause, as fully, completely and effectually as if approved, signed and ordered filed by order of the Judge or court trying said cause.

In witness whereof said counsel have hereunto set their hands this 25th day of October, 1932.

Hill, Fitzhugh & Brizzolara, Counsel for Plaintiff.

[fols. 27-31] Cravens & Cravens, Counsel for Defendant.

[fol. 32] [Caption omitted]

IN SUPREME COURT OF ARKANSAS

No. 2929

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

OSSIE MCCRAY, Appellee

Appeal from Sebastian Circuit Court, Ft. Smith District

JUDGMENT—March 20, 1933

This cause came on to be heard upon the transcript of the record of the circuit court of Sebastian county, Fort Smith district, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs; and that said appellee recover of said appellant and United States Fidelity & Guaranty Company, surety in the supersedeas bond filed in this cause, the sum of five hundred and seventy-one dollars and twenty-five cents, being the face of the policy sued on with interest to the date of the judgment, and 12% statutory penalty, and the further sum of two hundred dollars, as her attorney fee, taxed as costs, and that said judgment bear interest at six per cent per annum from 5th day of October, A. D. 1932, the date and amount of said judgment.

[fol. 33] It is further considered that said appellee recover of said appellant and said surety all her costs in this Court and the court below, including the attorney fee aforesaid, and have execution thereof.

No petition for rehearing was filed.

[fol. 34] IN SUPREME COURT OF ARKANSAS

No. 174

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

v.

MCCRAY

OPINION—March 20, 1933

MCHANEY, J.:

Appellee is the beneficiary named in a policy of insurance for $500 issued by appellant on the life of her husband, Jonas McCray, dated November 3, 1930, premiums being due and payable semi-annually on May 1 and November 1. The cash premium was paid, but the premium due May 1, 1931 was not paid when due nor within the grace period. The policy provided for a grace period of 30 days for the payment of any premium after the first "during which time the insurance shall continue in force." And further: "If any premium or installment of premium be

not paid before the end of the period of grace, then this policy shall immediately cease and become void," etc. It further provided that "This policy may be reinstated at any time after default in the payment of any premiums * * * upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company hereon, and the payment of overdue premiums, with interest at six per cent per annum."

The premiums due May 1, 1931, not having been paid when due, nor within the period of grace, the policy lapsed, but on August 1, 1931, same was reinstated. Thereafter, on May 10, 1932, more than one year from the date of the policy, but less than one year from the date of reinstatement, the insured, Jonas McCray, committed suicide. The policy contained a suicide clause as follows:

[fol. 35] "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

Proof of death was duly made and payment of the amount due under the policy demanded. Payment was refused, and this suit followed which was tried before the court on an agreed statement of facts, substantially as above set forth, resulting in a judgment against appellant for $500 with interest at 6% from May 20, 1932, 12% penalty and attorneys' fee of $100 for services in the circuit court and an additional $100 for services in the Supreme Court, if appealed to that court.

The defense in the circuit court and in this Court was and is that appellant was only liable for the premiums paid by the insured (for which amount it offered to confess judgment) for the reason, as it contends, that the clause against suicide within one year ran from the date of reinstatement of the policy, and not from the date of the policy itself. Appellant says: "If the clause began to run from the date of the original policy, the judgment of the lower court was correct." We do not understand there was ever but one policy and it bore date of November 3, 1930. Certainly there was never but one policy issued by appellant to insured. It lapsed and became void after

30 days from May 1, 1931 until August 1, 1931, during which time there was no insurance, but on the latter date the very same policy, not a new or different one, was reinstated by the payment of all delinquent premiums and furnishing evidence of insurability satisfactory to appellant. There is no room for the contention that any new or different contract or policy was in force after reinstatement. [fol. 36] By agreement between the parties a forfeiture of the policy was set aside and the same contract was reinstated. No new policy was issued and none contemplated. By the express terms of the policy it is provided that, "If within one year from the date of issue of this policy, the insured shall * * * die by his own hand the liability of the company shall be limited to the amount of the premiums paid hereon." It does not provide that the company's liability shall be thus limited if the insured shall die by his own hand within one year from the date of reinstatement, should the policy lapse. Time is to be reckoned "from the date of issue of this policy," not from the date of reinstatement, nor from the date of any other policy. No doubt appellant could have so worded its policy, but it has not seen fit to do so. We see no ambiguity in the matter, but if there were, under the settled rule of this Court, we would be bound to construe the clause most strongly against appellant.

The reinstatement clause above set out was a part of the contract giving the right so to do to the insured and could not arbitrarily be refused by appellant, if said clause were complied with. Appellant can not, by reason thereof, engraft on the contract a new condition or otherwise restrict its liability by conditions not contained therein. New York Life Ins. Co. v. Adams, 151 Ark. 123; Security Life Ins. Co. v. Leeper, 171 Ark. 77; Equitable Life Assurance Soc. v. King, 178 Ark. 293.

In the Leeper case, supra, there was a lapse by reason of failure to pay a premium, but was reinstated on application made a few days later. The application for reinstatement recited an agreement that "in the event of self-destruction, whether sane or insane, within one year from the date of approval by the company of this application [fol. 37] for reinstatement, the amount payable as a death benefit under said policy shall be equal to two annual premiums on said policy, and no more." Leeper committed

suicide within a year from the date of reinstatement, and the company defended on the ground of suicide. This court held that the case was ruled by the Adams case, supra, and said:

"The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the insured in procuring reinstatement."

In the case now under consideration, the application for reinstatement, if one, was silent in this respect, but even had it so provided, it would not be effectual to accomplish the purpose for which appellant contends in the absence of such a provision in the policy itself.

Appellant also contends that it should not be taxed with the penalty and attorneys' fee imposed by statute because it says it defended in good faith, the question involved not having been heretofore decided by this court. As we have already seen, the question litigated had been decided, but assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2) 557. This question is now settled and we decline to reconsider the matter.

Affirmed.

[fol. 38] IN SUPREME COURT OF ARKANSAS

EXCERPT FROM ORIGINAL BRIEF INSERTED AT APPELLANT'S REQUEST AS "ASSIGNMENT OF ERROR"

I

There is no evidence to support the judgment of the Court.

II

The Court erred in holding that the agreed state of facts, as a matter of law, imposed upon Appellant the liability for $500 and interest under the policy.

III

The Court erred in holding that the one-year suicide clause ran from the date of the original policy sued on herein, and in not holding that the suicide clause herein did not commence to run anew from the date of the reinstatement of the policy sued on.

IV

There is no evidence in the record to support the judgment of the Court in entering judgment against Appellant for the attorneys' fees of $100 in the Circuit Court and $100 in the Supreme Court of Arkansas in the event of an appeal or in assessing the penalty of twelve (12%) per cent or $60 against Appellant under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas.

V

The Court erred in allowing a penalty of twelve (12%) per cent or $60 in favor of the appellee and against the Appellant.

VI

The Court erred in allowing in favor of the Appellee and against the Appellant a fee for Appellee's attorneys herein, either in the Circuit Court or in the Supreme Court.

[fol. 39]

VII

The Court erred in holding that the Appellee was entitled to a judgment for the said penalty and attorneys' fees merely because judgment was given for the Appellee.

VIII

The Court erred in allowing a penalty or attorneys' fees in favor of the Appellee and against the Appellant, for the reason that the Appellant, in resisting Appellee's claim, had reasonable grounds and cause therefor, and that the Appellant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the Appellee was not entitled to recover in this cause, and that said penalty and attorneys' fees are taxed against the Appel-

lant solely by reason of the fact that the Appellee recovered the amount sued for, and that said penalty and attorneys' fees were allowed as aforesaid, without regard to the reasonableness or unreasonableness of the Appellant's refusal to pay, and without regard to whether or not the Appellant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the Appellee was not entitled to recover, and that the Court, in allowing said penalty and attorney's fees under the circumstances aforesaid, deprived the Appellant of the equal protection of the law, and of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty and attorneys' fees having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the [fol. 40] Statutes of the State of Arkansas, and which said section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty and attorneys' fees in favor of the Appellee merely in the event that the Appellee is successful in recovering the amount sued for, and without regard to whether or not the Appellee's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard to whether the Appellant's refusal to pay was based upon a well founded belief, reasonably entertained, that the Appellee was not entitled to recover, and that said section of the Statutes aforesaid, as so construed, deprives the Appellant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinabove set forth.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted.]

PETITION FOR APPEAL, STATEMENT, ASSIGNMENT OF ERRORS, JURISDICTION, AND PRAYER FOR REVERSAL

Petition for Appeal

Considering itself aggrieved by the decision of the Supreme Court of the State of Arkansas in the above styled

cause, the appellant herein, Life & Casualty Insurance Company of Tennessee, hereby prays that an appeal may be allowed to the Supreme Court of the United States herein, and have an order fixing the amount of the bond thereon.

Statement

This is a suit on an insurance policy for Five Hundred (500) Dollars, issued on the life of Jonas McCray, dated November 3, 1930. The policy lapsed on May 1, 1931 for non-payment of premium and was reinstated on August 1, 1931. Jonas McCray committed suicide on May 10, 1932, which was within one year from the date of the reinstatement or August 1, 1931. The judgment was for $790.45.

The policy provided:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

The question presented was whether or not the one year set out in this suicide clause began to run from the date of the policy November 3, 1930, or from the date of the re-[fol. 42] instatement on August 1, 1931. Appellant, Life & Casualty Insurance Company of Tennessee, insisted that the legal effect of the lapse of the policy was to end entirely the relation between the parties and that when the policy was reinstated all of its provisions began to run from the date of the reinstatement on August 1, 1931. The Arkansas Courts held otherwise.

The appellant, Life & Casualty Insurance Company of Tennessee, is a Tennessee corporation and prior to the issuance of the policy the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 477, held that where a policy lapsed for non-payment of premium and thereafter was reinstated the policy thereafter should be considered as of the date of the reinstatement, and that all of the terms of this policy began to run anew from such date. In thus deciding the question the Court said:

"It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at

maturity. Thompson v. Life Ins. Co., 104 U. S. 252, 86 L. Ed., 765; Ressler v. Life Insurance Company, 110 Tenn. 411, 75 S. W. 735.

"The effect of nonpayment of the premium is made clear by the policy itself. As is said in Lantz v. Insurance Co., 139 Pa. 546, 21 Atl. 81, 10 L. R. A. 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. * * * It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. * * * As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This, it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy [fol. 43] has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has ipso facto forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

This being a Tennessee corporation, and this policy having been issued after that decision, the above decision became the interpretation placed upon the terms of the policy and became as much a part of the policy as if written ex-

pressly therein, and, therefore, the reinstatement of the policy on August 1, 1931, gave the policy a new date and the suicide of Jonas McCray having occurred within the period of one year from such time, the appellant was not liable on the policy. The Court in the case of State Life Insurance Company v. Spencer, published in the Advance Sheets of 62 F. (2) page 650, is to the same effect. By reading the opinion of the Supreme Court of Tennessee in the above case it will be seen that it was thoroughly considered and was supported by the authorities and the late decision above mentioned affirming the same proposition of law shows that appellant had the right to defend this suit in good faith. The Supreme Court of Arkansas had not in any reported case decided the question, but in the cases of New York Life Ins. Co. v. Adams, 151 Ark. 123, 235 S. W. 412; Security Life Ins. Co. v. Leeper, 171 Ark. 77, 284 S. W. 12; and Equitable Life Assurance Soc. v. King, 178 Ark. 293, 10 S. W. (2d) 891, held that an insurance company in reinstating the policy had no right to set out in the reinstatement contract any new conditions not set out in the policy. The present case did not involve that question as the reinstatement application did not set out any new condition. An entirely different question was presented.

Therefore, it is clear that the exact question in the pres- [fol. 44] ent case had never been determined by the Supreme Court of Arkansas. However, if it had, the present policy being issued by a Tennessee corporation, and the Tennessee Supreme Court having held prior to its issuance that the policy began to run anew from the date of its reinstatement, appellant had the right in good faith to ask the Supreme Court of Arkansas to consider the matter, and its act in doing so could not be considered an act of defending in bad faith.

The judgment in the present case was for the amount of the policy, Five Hundred (500) Dollars, and twelve (12) per cent or Sixty (60) Dollars penalty and attorney's fees of Two Hundred (200) Dollars, authorized under Crawford and Moses Digest of the Statutes of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, which is as follows:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to

pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

The construction given by the Supreme Court of Arkansas is that this section imposes this penalty and attorney's fees in all cases where a judgment is rendered against an insurance company and the insurance company cannot defend against either the penalty or attorney's fees by proving or contending that their act in refusing to pay and in defending the law suit was good faith.

In disposing of this matter, after referring to the above cases holding that an insurance company in a reinstatement contract could not insert new conditions which as heretofore shown was not involved in this case, the Court held that the above penalty and attorney's fees were properly assessed, saying:

[fol. 45] "Assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

This appeal is now based upon the propositions that Section 6155 of Crawford & Moses' Digest of Arkansas is unconstitutional both under Article 1, Section 10 of the Federal Constitution forbidding a State to pass a law impairing the obligations of contracts and of the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, the Supreme Court of Arkansas having construed the above statute as being constitutional in all cases merely because a judgment is ren-

dered against an insurance company thereunder without reference to the refusal to pay and the defense of the law suit being made in bad faith.

Assignment of Errors

1

There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

2

The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitutional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1 Section 10 of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal [fol. 46] Constitution forbidding a State to pass the law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

3

The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the reason that appellant is a Tennessee Corporation and prior to the time the policy was issued the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 477, had held that where a policy lapsed and was reinstated the date of the policy became the date of the reinstatement and all of its provisions began to run anew, and this policy being issued by a Tennessee Corporation the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent

as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

Jurisdiction

The Acts of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest Court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State Court is in favor of its validity.

Such a question is presented here. Appellant contends that Sec. 6155 of Crawford and Moses' Digest of the Statutes of Arkansas heretofore copied is unconstitutional under Article 1, Section 10, of the Federal Constitution forbidding the passage of laws impairing the obligations of contracts and of the Fourteenth Amendment forbidding the taking of property without due process of law and [fol. 47] Arkansas Supreme Court has held the Statute valid against these objections. Therefore, appellant has the right to have this application for appeal granted. This question was considered by this Court in the case of Supreme Ruling of the Mystic Circle v. Snyder, 227 U. S. 497, 57 L. Ed. 611, in which it was urged that contrary to its terms, the Tennessee penalty statute authorized the assessment of the penalty where no bad faith was shown, the Court saying:

"The act does not make the mere refusal to pay sufficient evidence of bad faith, so as to justify the added recovery; it required that the bad faith be shown, and that the consequent additional loss be shown. And the state court so construed the statute in the application that was made in the present case."

The United States Court of Appeals for the Eighth Circuit has refused to follow the Alabama Supreme Court in holding this statute constitutional in the cases of Standard Accident Insurance Company V. Rossi, 35 F. (2d) 667 and Inter-Southern Life Insurance Company v. McElroy, 38 F. (2d) 557, and in the present case the Supreme Court of Arkansas expressly declined to follow the above decisions of the United States Circuit Court of Appeals for the Eighth Circuit, saying:

"* * * Assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, S. W. (2d) 585, where we expressly refused to follow the 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

Inasmuch as Arkansas is in the Eighth Circuit, this presents a conflict between these Courts as to the constitutionality of this Statute and your petitioner and other insurance companies have the right to have this matter settled by this Court.

The Supreme Court of Arkansas is the highest Court of Arkansas and the judgment in this case is final.

[fol. 48] Application for Appeal

Your petitioner applied to the Chief Justice of the Supreme Court of Arkansas for an order granting an appeal in this case, which was declined as shown by this record.

Prayer for Reversal

For which errors the appellant, Life & Casualty Insurance Company of Tennessee, prays that this appeal be granted and the said judgment (or decree) of the Supreme Court of the State of Arkansas, dated March 20, 1933, in the above entitled cause, be reversed as herein prayed and a judgment (or decree) rendered in favor of the said appellee, and for costs.

P. M. Estes, Attorney for Appellant.

[fol. 49] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING APPEAL

On this the 12th day of April, 1933, there is presented to me the undersigned, Chief Justice of the Supreme Court of Arkansas, the petition of the appellant, Life & Casualty Insurance Company of Tennessee, praying that an appeal be granted it from the deicsion of this Court of date March 20, 1933, to the Supreme Court of the United States.

After due consideration I am of the opinion that no Federal question is presented by said petition which would invoke the jurisdiction of the United States Supreme Court. Therefore, the petition and prayer for appeal is hereby denied.

Done at Little Rock, Arkansas, on this the 12th day of April, 1933.

C. E. Johnson, Chief Justice Arkansas Supreme Court.

[fol. 50] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment (or decree) made and entered in the above entitled cause by the Supreme Court of the State of Arkansas on the 20th day of March, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the Rules of the Supreme Court of the United States in such case made and provided,

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas in the above entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State

of Arkansas shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within 40 days of this date.

And it is further ordered that security for the judgment and costs on appeal be fixed in the sum of $1,600.00.

Dated this 21st day of April, 1933.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

[fols. 51 & 52] Bond on appeal for $1,600.00 approved; omitted in printing.

[fols. 53-70] Citation in usual form showing service on Hill, Fitzhugh, Brizzolara, filed April 28, 1933, omitted in printing.

[fol. 71] Certificate of lodgment omitted in printing.

[fol. 72] Return to allowance of appeal omitted in printing.

[fol. 73] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 22, 1933

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point 1. There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing

the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

Point 2. The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitutional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1, Section 10 of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal Constitution forbidding a State to pass a law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

Point 3. The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the [fol. 75] reason that appellant is a Tennessee Corporation and prior to the time the policy was issued the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 466, had held that, where a policy lapsed and was reinstated, the date of the reinstatement became the date of the policy and all of its provisions began to run anew, and the suicide of the assured being within one year from the date of the reinstatement, there could be no recovery; and this policy, being issued by a Tennessee Corporation, the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

Point 4. The judgment of the Supreme Court of Arkansas in this case violates the Constitution of the United States in the following particulars:

1. Article 4, Section 1:

"Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Section 6132 of the Code of Tennessee for 1932 expressly provides that appellant shall not discriminate between policy holders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennesssee, both by the above Section of Tennessee Code and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, and in violation of both statutes to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but [fol. 76] it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in Galbraith v. Ins. Co., 115 Tenn. 477, holding that under the language of this particular policy, it began to run anew from the date of the reinstatement, constitutes a judicial proceeding, which became a part of the contract itself, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, now give "full faith and credit" to either.

2. The interpretation of the Tennessee Supreme Court in Galbraith v. Insurance Company, supra, became a part of this policy and this later decision and judgment of the

Arkansas Supreme Court giving the contract an entirely different meaning constitutes a "subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void", as was held in Edwards v. Kearzey, 96 U. S., 595, 607 (24: 793, 798).

Section 10, Subsection 1, of the Federal Constitution provides:

"No State" shall make a law impairing the obligation of contracts, and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Complaint	2
Answer	4
Agreed Statement of Facts	17
Judgment of Lower Court	7
Motion for New Trial	9
Order Overruling Motion for New Trial and Granting Appeal	11
[fol. 77] Supplemental Motion for New Trial	12
Order Overruling Supplemental Motion and Granting Motion	16
Motion for New Trial	21
Supplemental Motion for New Trial	23
Judgment of Supreme Court of Arkansas	32
Opinion of Supreme Court of Arkansas	34
Excerpt from Original Brief Inserted at Appellant's Request as "Assignment of Error"	38
Petition for Appeal, Statement, Assignment of Errors, Jurisdiction, and Prayer for Reversal	41
Order of Arkansas Supreme Court Denying Appeal	49
Order of Mr. Justice Butler Allowing Appeal	50
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Title of paper	Record page
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Statement of Jurisdiction	55
Statement in Opposition to Jurisdiction	62

P. M. Estes, Counsel for Appellant, Life & Casualty Insurance Company of Tennessee.

We acknowledge service of the above "Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed", together with copy thereof for our use, this 17 day of May, 1933.

Hill, Fitzhugh & Brizzolara.

[fol. 78] [File endorsement omitted.]

Endorsed on cover: File No. 37,691. Arkansas Supreme Court. Term No. 89. Life & Casualty Insurance Company of Tennessee, appellant, vs. Ossie McCray. Filed May 22, 1933. No. 89, O. T., 1933.